

No.

In the Supreme Court of the United States

MARSHALL GRACE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Pullman-Standard v. Swint*, the Court held that, where a federal district court has failed to determine whether a party intended to engage in discrimination, federal appellate courts generally may not resolve that question in the first instance and should instead remand. 456 U.S. 273, 291-293 (1982).

The Second, Fourth, Sixth, and Seventh Circuits hold, consistent with *Pullman-Standard*, that federal appellate courts may not initially determine whether a peremptory strike was intentionally discriminatory under the third step of *Batson v. Kentucky*, 476 U.S. 79 (1986). Where a federal district court has failed to make that determination, those circuits therefore hold that “the ultimate *Batson* issue cannot be resolved without a remand.” *United States v. Rutledge*, 648 F.3d 555, 560 (7th Cir. 2011). The Fifth and Ninth Circuits have taken a different approach. Where a federal district court fails to make an intent determination under step three, they permit the appellate court to “decide *de novo*” whether the strike was “motivated by purposeful discrimination.” *United States v. Alvarez-Ulloa*, 784 F.3d 558, 565 (9th Cir. 2015).

The question presented is:

May a federal appellate court, after concluding that a federal district court has failed to make necessary findings under step three of *Batson v. Kentucky*, 476 U.S. 79 (1986), proceed to make those findings in the first instance?

PARTIES TO THE PROCEEDING

Petitioner Marshall Grace was defendant-appellant below.

Respondent United States of America was plaintiff-appellee below.

RELATED PROCEEDINGS

United States of America v. Marshall Grace, No. 24-30730 (5th Cir. Mar. 27, 2026).

United States of America v. Marshall Grace, No. 2:22-cr-00080 (E.D. La. Nov. 12, 2024).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marshall Grace respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 170 F.4th 980 and is reproduced in the appendix at 1a-12a. The Fifth Circuit's unreported order denying panel rehearing is reproduced in the appendix at 25a-26a. The unreported order of the district court is reproduced in the appendix at 13a-24a.

JURISDICTION

The court of appeals entered its judgment on March 27, 2026, and denied a timely filed petition for rehearing on May 5, 2026. On July 24, 2026, Justice Alito extended the time to file a petition for certiorari to September 2, 2026. On August 14, 2026, Justice Alito further extended the time to file a petition for certiorari to October 2, 2026. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Fourteenth Amendment of the United States Constitution, which provides in relevant part that: "No State shall * * * deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," made applicable against the federal government by the Fifth Amendment of the United States Constitution, which provides in relevant part that: "No person shall be * * * deprived of life, liberty, or property, without due process of law[.]"

STATEMENT

In our federal judicial system, “factfinding is the basic responsibility of district courts, rather than appellate courts.” *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974). Because of district courts’ comparative advantage in “apprais[ing] and weigh[ing] the evidence,” appellate courts are required to “constantly have in mind that their function is not to decide factual issues *de novo*.” *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 123 (1969). And when presented with inadequate trial-court findings, appellate courts are nearly always required to remand rather than try and “ma[ke] factual findings on [their] own.” *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

This petition addresses how this applies to challenges brought under *Batson v. Kentucky*, 476 U.S. 79 (1986). In *Batson*, the Court laid out a three-part framework for resolving whether a peremptory strike was motivated by race—the final step of which tasks “[t]he trial court” with “determin[ing] if the defendant has established purposeful discrimination.” 476 U.S. at 98. *Batson* specified trial courts for a reason: determining purpose is an archetypical (and credibility-laden) factual inquiry (*id.* at 98 n.21), which “lie[s] peculiarly within a trial judge’s province” (*Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (cleaned up)). The trial court’s assessment of purpose is therefore “essential” to the *Batson* analysis. *Pitchford v. Cain*, 608 U.S. 391, 395 (2026). Appellate courts, meanwhile, are required to “defer to the trial court[]” in all but “exceptional circumstances.” *Davis v. Ayala*, 576 U.S. 257, 274 (2015) (quotation omitted).

The Courts of Appeals are divided over what happens if there is no trial-level determination to which the appellate court may defer. Four circuits have found that the usual rules of appellate procedure continue to apply in such cases, and that because step three “hinge[s] on ring-side credibility determinations that no appellate court can fairly make,” the only option is to remand for adequate factfinding. *United States v. Kimbrel*, 532 F.3d 461, 468 (6th Cir. 2008) (Sutton, J.); accord *Salters v. New York City Transit Auth.*, 185 F.4th 31, 39-40 (2d Cir. 2026); *United States v. Joe*, 928 F.2d 99, 103-104 (4th Cir. 1991); *Carter v. City of Wauwatosa*, 114 F.4th 866, 875-876 (7th Cir. 2024).

The Ninth Circuit, now joined by the Fifth, charts a different course. Faced with inadequate findings, those circuits permit appellate panels to “decide *de novo*” whether the strikes at issue “were motivated by purposeful discrimination.” *United States v. Alvarez-Ulloa*, 784 F.3d 558, 565 (9th Cir. 2015). In some cases, this means holding that a litigant intended to discriminate, and that their testimony to the contrary was pretextual. See, e.g., *United States v. Alanis*, 335 F.3d 965, 969 (9th Cir. 2003). In others, such as this one, it means accepting a rationale the district court never credited. In all cases, however, it means making an appellate-level credibility determination from a cold record, without guidance from the factfinder.

The consequences of the Fifth and Ninth Circuits’ approach are far-reaching and are well illustrated here. Prosecutors struck a black juror from Petitioner’s venire whom they knew (and sought to know) almost nothing about. When challenged, they acknowledged they “didn’t have much to go on,” but

claimed to be concerned that the juror had seven sons. That explanation was implausible and untenable under the circumstances, so the district court refused to credit it. Instead, the district court upheld the strike based on an alternative rationale the government had not known existed when it made the relevant strike. On review, the Fifth Circuit panel rejected the district court's basis for upholding the strike. But the panel issued a precedential opinion finding, based on the trial transcripts, that the government's proffered motive survived *Batson* scrutiny.

The approach taken by the Fifth and Ninth Circuits is wrong. It misapplies this Court's precedent, exceeds the traditional bounds of appellate review, and denies both challengers and proponents of peremptory strikes the right to an adjudication by the judge most likely to make the correct call. The Court's review is warranted. Alternatively, if the Court does not grant plenary review, it should grant, vacate, and remand in light of the Court's opinion in *Pitchford*.

A. Legal background

In *Batson*, the Court affirmed that, even in the context of peremptory strikes, “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race.” 476 U.S. at 89. In the forty years since, the Court has “vigorously enforced and reinforced” *Batson*'s core premise that “[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process.” *Flowers v. Mississippi*, 588 U.S. 284, 301 (2019).

To guard against such discrimination, *Batson* crafted “a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race.” *Snyder*, 552 U.S. at 476. First, at step

one, the challenger must make “a prima facie case of purposeful discrimination in selection of the petit jury.” *Batson*, 476 U.S. at 96. At that point, under step two, “the burden shifts” to the proponent of the strike “to come forward with a neutral explanation” justifying it. *Id.* at 97. Finally, under step three, “[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination.” *Id.* at 98. As the Court held last Term, the trial court at step three must provide the movant with “a sufficient opportunity to rebut” the proponent’s “proffered race-neutral reasons” prior to making a call. *Pitchford*, 608 U.S. at 399. And as the Court emphasized, an adequate step-three ruling by the trial court is “essential” in fulfilling *Batson*’s mandate. *Id.* at 395.

Step three’s inquiry—whether a strike was racially motivated—is a “pure issue of fact” which “largely will turn on evaluation of credibility.” *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (*Miller-El I*) (quoting *Hernandez v. New York*, 500 U.S. 352, 364–365 (1991) (plurality opinion)). That is because, “[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel’s race-neutral explanation for a peremptory challenge should be believed,” for which “the best evidence often will be the demeanor of the attorney who exercises the challenge.” *Ibid.* In determining whether to credit a race-neutral justification, courts are required to consider “all possible explanatory factors” (*Batson*, 476 U.S. at 95), including “the prosecutor’s demeanor; * * * how reasonable, or how improbable, the explanations are; and * * * whether the proffered rationale has some basis in accepted trial strategy” (*Miller-El I*, 537 U.S. at 339). Where relevant, they must also examine

statistical, comparative, and historical evidence. See *Flowers*, 588 U.S. at 302. Ultimately, however, a challenger under *Batson* need not show prior instances of discrimination to succeed, since “[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.” *Foster v. Chatman*, 578 U.S. 488, 499 (2016) (cleaned up); see also *Flowers*, 588 U.S. at 298 (“In the eyes of the Constitution, one racially discriminatory peremptory strike is one too many.”).

As a credibility-laden factual inquiry, the Court in *Batson* delegated step three to “the trial court.” 476 U.S. at 98, 99 n.21. The Court has since emphasized that the responsibility for performing step three “rests first and foremost with” the “trial judges operat[ing] at the front lines of American justice.” *Pitchford*, 608 U.S. at 398-399 (quoting *Flowers*, 588 U.S. at 302); *Miller-El I*, 537 U.S. at 338-339 (noting that “step three * * * comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible”). This “pivotal role” recognizes that “determinations of credibility and demeanor lie peculiarly within a trial judge’s province” (*Snyder*, 552 U.S. at 477) and that it is the trial judge who is “best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes” (*Ayala*, 576 U.S. at 273-274).

In contrast, appellate review of *Batson* challenges is narrowly circumscribed. See *Batson*, 476 U.S. at 98 n.21. While appellate courts consider “the same factors as the trial judge” in reviewing *Batson* challenges, they are “necessarily” limited to “doing so on a paper record” (*Flowers*, 588 U.S. at 303) and are thus

inherently “not as well positioned as the trial court is to make credibility determinations” at the heart of step three (*Miller-El I*, 537 U.S. at 339). See, e.g., *Ayala*, 576 U.S. at 274 (“Appellate judges cannot on the basis of a cold record easily second-guess a trial judge’s decision about likely motivation.” (quotation omitted)). While appellate courts serve a key role in guarding against extreme malfunctions (see *Miller-El I*, 537 U.S. at 340 (noting that “[d]eference does not by definition preclude relief”)), they do not provide “‘independent’ appellate review” of *Batson* determinations (*Hernandez*, 500 U.S. at 366). Instead, the trial court’s finding receives only “highly deferential” review, and “must be sustained unless it is clearly erroneous.” *Flowers*, 588 U.S. at 303 (quotation omitted).

B. Factual background and proceedings below

1. On July 29, 2020, Louisiana state police officers initiated a traffic stop of a vehicle petitioner was driving. See C.A. App. 436, 438. In the resulting search, officers uncovered marijuana on petitioner’s person and a bag containing methamphetamine in the trunk of the car. *Ibid.* On June 14, 2024, petitioner was charged under a two-count superseding indictment with conspiracy to distribute and possess with intent to distribute at least 500 grams of methamphetamine in violation of 21 U.S.C. § 846, and with possession with intent to distribute at least 50 grams of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B). C.A. App. 369-371. Petitioner pleaded not guilty to all charges. C.A. App. 376.

2. Jury selection for petitioner’s trial took place on August 12, 2024. C.A. App. 776, Tr. 1. Following *voir dire*, the government used its peremptory strikes to remove two out of the four eligible black

venirepersons. App., *infra*, 15a, 18a. One of those strikes removed Edward Davis (Juror 8). *Ibid.* The government had asked no prior questions of Mr. Davis, who “hardly had anything to say” during *voir dire*. *Ibid.* Indeed, Mr. Davis’s only time speaking was (prompted by the district court) a brief introduction: “Edward Davis from Gretna. I work at River Parish Disposal. Eight kids; seven boys, one girl. Single.” C.A. App. 900, Tr. 125.

The government did not follow up with Mr. Davis regarding his sons, despite the opportunity to do so. See C.A. App. 911, Tr. 136; App., *infra*, 15a-16a. At least four white jurors likewise indicated that they had children, and the government did not move to strike them. See C.A. App. 899, Tr. 124 (Juror 4); C.A. App. 904, Tr. 129 (Juror 21); C.A. App. 906, Tr. 131 (Juror 30); C.A. App. 907, Tr. 132 (Juror 31).

Petitioner challenged the strike of Mr. Davis as racially motivated in violation of *Batson*. App., *infra*, 15a.

When asked by the district court to justify striking Davis, the government responded that:

[T]here wasn’t much to go on for Mr. Davis except for the fact that we knew he had seven sons and based on that information and not knowing much else about him, we chose that he would probably not be a great juror for the government.

App., *infra*, 15a. The government did not elaborate as to why Mr. Davis’s children had any relevance to his jury qualifications or what about them meant he would “not be a great juror for the government.”

The district court refused to credit the government, noting that:

I think you need more than that. I mean, you could have asked him questions about his seven sons and for that reason you didn't feel it necessary to ask him questions about the seven sons. I don't think that's any—you're not convincing me that is a proper reason to strike this African American gentleman when you have an African American Defendant.

App., *infra*, 15a-16a.

Nevertheless, prior to ruling on petitioner's *Batson* challenge—and after the government provided the district court with race-neutral justifications for its *other* peremptory strikes—the district court decided *sua sponte* to recall Mr. Davis and “take the lead and ask him questions about his family and all of that stuff” in order to determine whether there was a proper race-neutral basis for excluding him from the jury. App., *infra*, 18a. Prior to doing so, the district court reiterated to the government that “the fact that he has ten—seven sons, you know, I still have to look at whether the *prima facie* or not, I have to look at everything and, you know—I have a problem with that. I'm just telling you.” *Id.* at 19a.

In response to the district court's questioning, Mr. Davis revealed that one of his children had previously spent over two years in jail on a gun charge, and that he questioned whether his son had been treated fairly by the criminal justice system. App., *infra*, 21a-22a. The district court then announced that it was denying the *Batson* challenge—finding that “had the government known this” information previously it would

have served as a valid basis for a strike. *Id.* at 22a-23a. The district court overruled petitioner’s objection that “the government made its decision before it knew” these facts about Mr. Davis’s son but held that he had preserved it for the record. *Id.* at 23a.

The government and petitioner then selected alternate jurors (one of whom was black) and proceeded to trial. C.A. App. 945, Tr. 170. Petitioner was ultimately convicted on both counts. C.A. App. 597. On November 12, 2024, the district court sentenced petitioner to the statutory minimum of 120 months’ imprisonment (to be followed by five years’ supervised release). C.A. App. 598.

3. On appeal, both the government and petitioner acknowledged (and the Fifth Circuit agreed) that whether the district court properly rejected petitioner’s *Batson* challenge turned solely on *Batson*’s step three. See App., *infra*, 11a n.8. Moreover, the panel unanimously held that—in conducting its step-three analysis—the district court “erroneously elicited additional testimony from Davis in derogation of settled law.” *Id.* at 10a. The panel took the “opportunity to emphasize” that, in so doing, “the district court strayed from Supreme Court and Fifth Circuit precedent.” *Ibid.*

As the panel noted, the goal of step three is to analyze what *actually* motivated a strike, not to probe unknown bases that might have justified it. App., *infra*, 10a-11a. As such, this Court’s precedent requires “*the prosecutor*,” not the district court, to “give a clear and reasonably specific explanation of his legitimate reasons for exercising the challeng[e].” *Id.* at 10a (quoting *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*)) (emphasis in original). The district

court’s task, in contrast, is solely to “determine whether the prosecutor’s proffered reasons are the actual reasons.” *Id.* at 11a (quoting *Flowers*, 588 U.S. at 303). The panel concluded that “the district court supplanted this burden by questioning Davis *sua sponte*, in an erroneous attempt to find a race-neutral reason on the Government’s behalf.” *Ibid.*

Despite holding that the district court’s dispositive rationale was legally erroneous, the panel declined to remand. App., *infra*, 11a-12a. In so doing, the panel did not rely on any alternative findings from the district court deeming the “seven-sons” justification non-pretextual (there were none). Instead, the panel independently determined—in a published opinion—that petitioner had “failed to meet” his “burden of showing racial discrimination at step three.” *Id.* at 12a. The panel found that, at a statistical level, petitioner had failed to show “that the low percentage of empaneled black jurors indicated racial discrimination.” *Ibid.* And although the district court had expressly refused to make this finding, the panel concluded that petitioner had failed to show that the prosecutor’s “seven-sons” explanation was pretextual. See *ibid.* Based on that independent review, the panel affirmed petitioner’s conviction. See *ibid.*

REASONS FOR GRANTING THE PETITION

In upholding petitioner’s conviction, the Fifth Circuit adopted the minority position in an already-entrenched circuit split. That position permits appellate courts facing deficient findings to affirm based on what they believe the trial court *would have* found had it properly applied step three. As four circuits have recognized, this approach departs from the Court’s guidance in *Batson*, bypasses the normal

judicial order of operations, and exceeds the proper confines of appellate review. The Court should grant review.

A. The Circuits are squarely divided.

A well-developed split has emerged regarding how an appellate court should respond where there *is no* trial-level decision to which it may defer with respect to step three of the *Batson* analysis. On the one side, at least the Second, Fourth, Sixth, and Seventh Circuits hold that step-three determinations may only be made in the first instance by the trial court, and that where such a determination is necessary, the only option is a remand for the district court to weigh in, followed by clear-error review of its findings. On the other side, the Fifth and Ninth Circuits authorize appellate panels faced with such circumstances to conduct independent review and determine from the paper record whether the movant has met their burden.

This division is both entrenched and long-recognized. See, e.g., *Jones v. State*, 938 A.2d 626, 633-634 & n.33 (Del. 2007) (recognizing that the Ninth Circuit’s approach departs from that of most other federal courts). It also proved dispositive to petitioner’s appeal—had petitioner’s case arisen in the Second, Fourth, Sixth, or Seventh Circuits, those courts would have remanded for the district court to conduct *Batson* step three in the first instance. This clear split of authority warrants the Court’s intervention.

1. The Second Circuit has repeatedly confirmed that, because the responsibility for *Batson*’s step three “falls primarily on the judicial officer conducting the jury selection” (*United States v. Alvarado*, 923 F.2d 253, 256 (2d Cir. 1991)), where a district court has failed to make the requisite findings, “the appropriate

course usually will be to remand for' the district court to conduct a reconstruction hearing" if doing so is still possible (*Salters v. New York City Transit Auth.*, 185 F.4th 31, 40 (2d Cir. 2026) (quoting *Barnes v. Anderson*, 202 F.3d 150, 156 (2d Cir. 1999))). The only alternative the Second Circuit recognizes is to "remand the case to the district court for a new trial" where reconstruction is no longer feasible. *Barnes*, 202 F.3d at 156-157.

The Second Circuit has consistently applied this remand requirement and has never treated appellate-stage factfinding as an adequate alternative. See *Salters*, 185 F.4th at 40 (noting that the appellate court must be able to know "whether the trial court has fully discharged its constitutional responsibilities under *Batson*"); see also *United States v. Bontzolakes*, 536 F. App'x 41, 44 (2d Cir. 2013) (remanding where trial court's ruling "left unclear whether it actually performed the determination required at the third step of *Batson*"); *Galarza v. Keane*, 252 F.3d 630, 636 (2d Cir. 2001) (Sotomayor, J.) (noting, on a *habeas* appeal, that the Second Circuit has "repeatedly emphasized" that it is reversible error for a trial court to "deny a *Batson* motion without determining whether it credits the race-neutral explanations for the challenged peremptory strikes").

The **Fourth Circuit** similarly rejects appellate *Batson* factual determinations. *United States v. Joe*, 928 F.2d 99, 103-104 (4th Cir. 1991). Although the district court had failed to perform an adequate *Batson* analysis, the defendants urged the *Joe* court to "conduct a review of the reasons offered by the government and determine in the first instance whether it exercised its strikes in a discriminatory manner" because

“the record [was] sufficiently developed.” *Id.* at 103. The Fourth Circuit refused, noting that appellate courts “are not well positioned to conduct this important analysis with only a cold record and without the benefit of findings and supporting reasons of the trier of fact.” *Id.* at 104. The court emphasized that, on appeal, the parties to the case “are not present before [the] court to permit [it] to judge their credibility” and held that the absence of trial-level findings “*compelled* [it] to remand” for further proceedings. *Ibid.* (emphasis added).

The **Sixth Circuit** has likewise held that *Batson*’s step three cannot be initially conducted at the appellate level, most clearly in *United States v. Kimbrel*. 532 F.3d 461, 467-469 (6th Cir. 2008) (Sutton, J.). The district court in *Kimbrel* sustained a *Batson* challenge based on a “short circuit[ed]” step-three analysis that misallocated the burden of proof. *Id.* at 466-468. On appeal, the government argued that, rather than remanding, the Sixth Circuit should review the record and “determine for itself whether the government satisfied its ultimate burden of persuasion.” *Id.* at 468. Writing for the panel, Judge Sutton rejected this proposal as calling for factfinding that is neither feasible nor permissible on appeal, and that the Sixth Circuit had long rejected it “for good reason.” *Ibid.* (citing *United States v. McFerron*, 163 F.3d 952, 955-956 (6th Cir. 1998)). The court emphasized that “*Batson*’s third step * * * presents factual questions that hinge on ring-side credibility determinations that no appellate court can fairly make on the basis of a non-sentient record” and concluded that a remand was necessary for the district court to make the necessary findings in the first instance. *Kimbrel*, 532 F.3d at 468. The Sixth

Circuit has since reiterated in *United States v. McAllister* that, where the record is “unclear as to whether the district court engaged in the third step of *Batson*,” a remand for “explicit on-the-record findings” is necessary before the appellate court can resolve the merits of the *Batson* challenge. 693 F.3d 572, 582 (6th Cir. 2012); see also *United States v. Mahbub*, 818 F.3d 213, 227-228 (6th Cir. 2016) (remanding where the district court improperly failed to reach step three).

Finally, the **Seventh Circuit** has also “consistently” refused to make *de novo* determinations under *Batson*’s step three (*Carter v. City of Wauwatosa*, 114 F.4th 866, 875 (7th Cir. 2024)) and has instead made clear that where it “confront[s] an evidentiary gap at step three, the ultimate *Batson* issue cannot be resolved without a remand” (*United States v. Rutledge*, 648 F.3d 555, 560 (7th Cir. 2011)). This is because the absence of step-three findings creates “a void that stymies appellate review, gives [the court] no finding of fact to which [it] might defer, and ultimately precludes [it] from affirming the denial of the *Batson* challenge.” *Rutledge*, 648 F.3d at 560; see also *United States v. McMath*, 559 F.3d 657, 666-667 (7th Cir. 2009) (“[T]he district court’s silence leaves a void in the record that does not allow us to affirm the denial.”). The Seventh Circuit has repeatedly reaffirmed this approach. See, e.g., *Lisle v. Wellborn*, 933 F.3d 705, 715 (7th Cir. 2019) (“Because the district court did not make a credibility finding here, we must remand for further findings and, depending on the findings, a new trial.”); *United States v. Watkins*, 107 F.4th 607, 621 (7th Cir. 2024) (remanding for the “purpose of correctly employing the three-step process under *Batson*”). And it has done so even in cases where

the record was strongly suggestive of the correct result. See, *e.g.*, *United States v. Taylor*, 509 F.3d 839, 844-845 (7th Cir. 2007) (finding “persuasive” evidence that a strike was motivated by race but nevertheless remanding in recognition that “[o]nly the district judge, who observed the voir dire firsthand, can make that determination in the first instance”).

2. Here, the **Fifth Circuit** took the opposite approach, affirming petitioner’s conviction despite finding that “the district court should not have questioned Davis further,” because, in the panel’s view, “Grace [had] failed to meet [his] burden” to “show that the prosecutor’s race-neutral reason” (i.e., Davis’s seven sons) was in fact pretextual. App., *infra*, 11a-12a. The Fifth Circuit reached this conclusion even though the district court declined to credit the prosecutor’s proffered explanation. See pp. 8-9, *supra*.

Likewise, “[f]aced with an improper application of the *Batson* framework,” the **Ninth Circuit** has long held that an appellate court “may decide *de novo* whether the government’s strikes were motivated by purposeful discrimination.” *Alvarez-Ulloa*, 784 F.3d at 565. The Ninth Circuit therefore regularly declines to remand in such cases and instead determines based on the record whether the strike was motivated by an impermissible factor. See, *e.g.*, *United States v. Alanis*, 335 F.3d 965, 969 (9th Cir. 2003) (“Had the court properly proceed[ed] to step three, it would have concluded that the prosecutor’s gender-neutral explanations were pretexts for purposeful discrimination.”); *United States v. Calderon-Jimenez*, 637 F. App’x 295, 297 (9th Cir. 2016); *United States v. Moore*, 825 F. App’x 453, 455-456 (9th Cir. 2020); *United States v. Centeno*, 2026 WL 312177, at *1 (9th Cir. Feb. 5,

2026). This includes *habeas* cases proceeding under AEDPA. See, e.g., *Brown v. Papa*, 317 F. App'x 589, 594 (9th Cir. 2006) (concluding, after the state court “fail[ed] to conduct the third step of the prescribed analysis,” that had it done so it would have found pretext). And, in keeping with the notion of independent appellate review, it includes cases where a contrary finding would plainly not have been clearly erroneous. See, e.g., *United States v. Mikhel*, 889 F.3d 1003, 1030-1031 (9th Cir. 2018) (concluding, despite “troubling” weaknesses in the government’s explanation, that “[o]n balance” the panel “[could] not say defendants ha[d] met their burden” under *Batson*’s step three).

B. This case is an attractive vehicle for resolving this important question.

1. Whether *Batson* step three can be assessed in the first instance by federal courts of appeals is an important question warranting the Court’s review. This is true for both criminal defendants *and* prosecutors alike.

a. A criminal defendant asserting a *Batson* challenge has a significant interest in a trial court making the necessary factual determinations.

As the Court noted in *Batson*, being forced to stand trial before a jury shaped by race discrimination denies litigants “the protection that a trial by jury is intended to secure” and is “a primary example of the evil the Fourteenth Amendment was designed to cure.” *Batson*, 476 U.S. at 85-86. Such discrimination, where permitted, subjects litigants to “the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings” and “raises serious questions as to the fairness of the” discrimination-tainted trial. *J.E.B. v. Alabama ex rel.*

T.B., 511 U.S. 127, 140 (1994) (quotation omitted). Ultimately, “[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process.” *Flowers*, 588 U.S. at 301.

To protect these interests, *Batson* “adopted a procedure for ferreting out discrimination” that intentionally “place[d] great responsibility in the hands of the trial judge” as the person best positioned to accurately “determine whether a peremptory challenge is based on an impermissible factor.” *Ayala*, 576 U.S. at 285. That “framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process” (*Johnson v. California*, 545 U.S. 162, 172 (2005)), and rigorously adhering to it “is essential to ensure that defendants receive a fair trial and to preserve the public confidence upon which our system of criminal justice depends” (*Foster*, 578 U.S. at 523 (Alito, J. concurring)). Accord *Pitchford*, 608 U.S. at 395.

In departing from *Batson*’s order-of-operations, the Fifth and Ninth Circuits’ approach risks undermining that confidence. Shifting first-instance fact-finding authority to a panel acting on a cold record, and away from the court that supervised the *voir dire*—which heard and saw the participants—fosters a perception of unfairness antithetical to judicial proceedings. See *Powers v. Ohio*, 499 U.S. 400, 412 (1991); see also Brett M. Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings*, 99 Yale L.J. 187, 197 (1989) (a defendant’s presence during *Batson* factfinding “contributes both to the actual fairness of the procedure and to the appearance of fairness”). And because the appellate court is “not as well positioned” to decide the

question (*Miller-El I*, 537 U.S. at 339), it also risks precisely the “backsliding” the Court has long “guarded against” (*Flowers*, 588 U.S. at 301).

b. The proponent of a strike, usually a prosecutor, likewise has an interest in the district court adjudicating the key facts in a *Batson* claim.

When properly performed, peremptory strikes have long “been viewed as one means of assuring the selection of a qualified and unbiased jury” (*Batson*, 476 U.S. at 91) and “provide[] one reason for wide acceptance of the jury system and of its verdicts” (*Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991)). See *Lewis v. United States*, 146 U.S. 370, 376 (1896) (“The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury.”). While recognizing that the wholesale bar on probing such challenges needed to yield to the realities of discrimination, *Batson* emphasized that its framework was intended to preserve “the contribution the challenge generally makes to the administration of justice” and the “selection of an impartial jury.” 476 U.S. at 98-99, 99 n.22; see also *Hernandez*, 500 U.S. at 374 (O’Connor, J., concurring in judgment) (noting that, “[a]bsent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory strikes for any reason, or no reason at all”).

The Court has recognized that the competing goals of preserving legitimate peremptory challenges while rooting out discrimination coexist uneasily. See, e.g., *Miller-El II*, 545 U.S. at 252 (recognizing the difficulties faced by proponents). That is because, under *Batson*, the proponent of a strike is required to “state

his reasons as best he can” (*Miller-El II*, 545 U.S. at 252) for “fine judgment calls” (*Ayala*, 576 U.S. at 273), frequently based on “seat-of-the-pants instincts” (*Batson*, 476 U.S. at 106 (Marshall, J., concurring)). See also *Rice v. Collins*, 546 U.S. 333, 343-344 (2006) (Breyer, J., concurring) (noting that *Batson* “asks prosecutors to explain the unexplainable”). It is one thing, as *Batson* held, to require proponents to make that showing in the first instance before a court that can see and hear them, and that is optimally situated to accurately assess their credibility. See *Ayala*, 576 U.S. at 273-274. It is another matter entirely to subject proponents of juror strikes to *de novo* factfinding by an appellate panel.

That, however, is exactly what the Fifth and Ninth Circuits’ approach entails. While here the Fifth Circuit found that petitioner had not shown purposeful discrimination, appellate courts applying its approach have proven themselves equally capable of ruling that a proffered race-neutral motivation was in fact pretextual. See, e.g., *Alanis*, 335 F.3d at 969 (concluding on *de novo* review that prosecutor’s proffered non-discriminatory motive was pretextual); *Papa*, 317 F. App’x at 594 (same). And courts on the majority side of the split have made clear that it is their adherence to the restrictions on appellate factfinding that stops them from doing the same. See, e.g., *Taylor*, 509 F.3d at 844-845 (refraining from making initial step-three determination on appeal, despite “persuasive” record evidence regarding correct result).

Permitting appellate courts to make step-three determinations inevitably affects both sides of the caption. Cf. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (noting that *Batson*’s requirements apply

equally to both sides of the proceeding). In so doing, it forces both proponents and challengers to litigate their claims before the wrong factfinder and implicates public interests the Court has long treated as paramount.

2. This petition provides an appropriate vehicle for resolving this long-percolating dispute.

The Fifth Circuit’s independent factfinding was dispositive to petitioner’s appeal. Not only did the district court *not* find the government’s race-neutral justification to be credible, but also it repeatedly refused to sustain the strike based on that justification. See App., *infra*, 15a (“I think you need more than that”); *id.* at 19a (“I have a problem with that. I’m just telling you”). For good reason. The government had shown no interest in the juror’s sons prior to being *Batson*-challenged. See *Miller-El II*, 545 U.S. at 246 (noting that the “failure to engage in any meaningful voir dire examination on a subject the [government] alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination” (quotation omitted)). It had taken no issue with at least four similarly situated white jurors. See p. 8, *supra*; *Flowers*, 588 U.S. at 311 (“When a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination.”) (quotation omitted). And—most importantly—its explanation made no sense: the charged crime had nothing to do with children. See *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (noting that “implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination”).

The district court, which had the opportunity to hear and observe the prosecutor, was thus amply justified in not crediting the government’s stated justification—and had it sustained the challenge this would easily have withstood clear-error review. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) (noting that, where the issue cannot be proven by external evidence, a trial court’s credibility determination will virtually never constitute clear error). And while the district court ultimately denied the challenge on a separate, *post hoc* ground, that unrelated finding had no bearing on the credibility of the prosecutor’s stated motive. See *Snyder*, 552 U.S. at 479 (emphasizing that an appellate court may not “defer[]” to a trial court’s credibility determination where the “record does not show that the trial judge actually made a determination”).

Under the majority approach, the court of appeals’ rejection of the district court’s *post hoc* reasoning would have then led to a clear result—remand, for the factfinder to make the necessary factual findings for *Batson* step three in the first instance. Instead, because it made an independent assessment of the merits, concluding that petitioner “failed to show purposeful discrimination” (App., *infra*, 12a), petitioner lost. The question presented here is thus dispositive of the result reached below.

3. This petition is ideally postured to resolve the question presented. Because the petition arises on direct review from a federal conviction, the question presented is not complicated by consideration of AEDPA deference (see generally *Thaler v. Haynes*, 559 U.S. 43 (2010)), or the relevance of the additional “flexibility in formulating appropriate procedures to comply with

Batson” the Court has granted to States (*Johnson*, 545 U.S. at 168). Rather, given the context, the pure legal question is presented for review.

C. The decision below is wrong.

The minority approach of the Ninth and now Fifth Circuits is incompatible with *Batson* and irreconcilable with traditional norms of appellate procedure.

1. As the Court has repeated six times over, *Batson*’s step three lies “peculiarly” within “a trial judge’s province.” *Flowers*, 588 U.S. at 303; *Ayala*, 576 U.S. at 274; *Snyder*, 552 U.S. at 477; *Collins*, 546 U.S. at 338; *Miller-El I*, 537 U.S. at 339; *Hernandez*, 500 U.S. at 365 (plurality opinion). The Court has therefore repeatedly emphasized that it intended *Batson*’s step three to be “first and foremost” an inquiry for “trial judges.” *Pitchford*, 608 U.S. at 398-399 (quoting *Flowers*, 588 U.S. at 302); see also *Batson*, 476 U.S. at 98 (delegating step three to “[t]he trial court”); *Miller-El II*, 545 U.S. at 239 (same); *Snyder*, 552 U.S. at 477 (emphasizing the “trial court[’s] * * * pivotal role”); *Ayala*, 576 U.S. at 285 (noting that step three “places great responsibility in the hands of the trial judge”). And the Court has been emphatic that rigorous adherence with every step of *Batson* is “essential” to complying with its mandate. *Pitchford*, 608 U.S. at 395; accord *Foster v. Chatman*, 578 U.S. 488, 523 (2016) (Alito, J., concurring).

Those statements speak for themselves. The Fifth and Ninth Circuits’ position that appellate courts can permissibly act as first-instance factfinder at *Batson*’s step three cannot be squared with how the Court has formulated that step.

2. The Court’s formulation of *Batson*’s step three reflects longstanding norms regarding the respective roles of appellate and trial courts. The Fifth and Ninth Circuits’ approach is irreconcilable with those norms.

From the founding, our federal judiciary has operated from a recognition that appellate courts reviewing a paper record are disadvantaged at resolving “pure question[s] of fact.” *United States v. One Hundred & Twelve Casks of Sugar*, 33 U.S. (8 Pet.) 277, 278 (1834); see *Wiscart v. D’Auchy*, 3 U.S. (3 Dall.) 321, 329 (1796) (Elsworth, C.J.) (justifying the common-law practice under which “part shall be decided by one tribunal, and part by another; the facts by the court below, and the law by this court”). Barring extreme malfunctions, questions about how to evaluate oral testimony have always been treated as principally the province of the trial courts “seeing and hearing” that testimony. *One Hundred & Twelve Casks*, 33 U.S. at 279; see also *The Quickstep*, 76 U.S. 665, 669 (1869) (recognizing the deference owed by appellate tribunals to the “court that [could] see the witnesses, hear their statements, observe their demeanor, and compare their degree of intelligence”).

In its modern form, the principle that factfinding is the province of trial courts is reflected in the requirement that “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.” Fed. R. Civ. P. 52(a)(6); see *Maine v. Taylor*, 477 U.S. 131, 145 (1986) (noting that this standard generally applies to non-guilt determinations in criminal cases). As the Court “frequently has emphasized” (*Maine*, 477 U.S. at 145), one goal of

Rule 52 is for appellate courts to “constantly have in mind that their function is not to decide factual issues *de novo*” (*Anderson*, 470 U.S. at 573 (quoting *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 123 (1969))).

Leaving first-instance factfinding to trial courts serves multiple overlapping ends. It respects Congress’s decision that courts of appeals exercise appellate, rather than original, jurisdiction. See *Dupree v. Younger*, 598 U.S. 729, 734 (2023) (“Appellate review, by its nature, requires a lower court decision to review.”). It “preserve[s the] trial court’s integrity as a court of law, instead of as an ‘entrance gate’ for fact collecting subject to appellate review.” *Wainwright v. Witt*, 469 U.S. 412, 428 n.10 (1985) (citation omitted). In the long run, it avoids the “huge cost in diversion of judicial resources” and negligible contribution to “the accuracy of fact determination” that would come from having *two* factfinding tribunals in every case. *Anderson*, 470 U.S. at 575. And, in the criminal context, it honors the reality that the “criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not.” *Davila v. Davis*, 582 U.S. 521, 531 (2017).

Most importantly, requiring factual disputes to first be resolved by trial courts helps ensure those disputes are resolved correctly: the “trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise.” *Anderson*, 470 U.S. at 574; see also *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) (noting the “unchallenged superiority of the district court’s factfinding ability”). That is especially true when the determination involves evaluating testimony. See, e.g., *Bose Corp. v.*

Consumers Union of U.S., Inc., 466 U.S. 485, 500 (1984). Only the judge hearing testimony can be “aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.” *Anderson*, 470 U.S. at 575.

3. Given trial courts’ comparative advantage at factfinding, it is settled law that appellate courts faced with inadequate findings may not attempt to resolve contested issues on their own—most clearly by *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), and *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986).

In *Pullman-Standard*, the Court held that whether someone intended to discriminate under Title VII is “a pure question of fact” that must in the first instance be determined by the district court. 456 U.S. at 289. It further held that, consequently, where “an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law,” it may not proceed to resolve contested questions regarding discriminatory intent in the first instance. *Id.* at 291. Instead, so long as there is any genuine question of fact, the court is required to “remand for further proceedings to permit the trial court to make the missing findings.” *Id.* at 291-292 (citing *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974) (reversing where “the Court of Appeals should not have resolved in the first instance [a] factual dispute which had not been considered by the District Court”)).

Even where a district court did make findings, but applied an erroneous standard, *Pullman-Standard* made clear that the appellate court *still* may not “make its own independent findings” on discriminatory intent. 456 U.S. at 293. Instead, appellate courts faced with deficient findings are “require[d]” to

remand “for further proceedings to the tribunal charged with the task of factfinding in the first instance.” *Ibid.* The Court emphasized that this remand requirement is “elementary” and thought it “incredible” that an appellate court would consider another course. *Id.* at 292-293. And the Court stressed that the “only exception” is where no appellate factfinding is needed because “the record permits only one resolution” once the right standard is applied. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 n.3 (2008) (quoting *Pullman-Standard*, 456 U.S. at 292).

In *Icicle Seafoods, Inc. v. Worthington*, the Court reaffirmed that federal appellate courts may not resolve factual issues themselves. 475 U.S. at 713-714. *Icicle Seafoods* arose from a dispute regarding whether the plaintiffs qualified as “seamen” under 29 U.S.C. § 213(b)(6). *Id.* at 710. After determining that the district court had applied the wrong standard, the Ninth Circuit “reviewed the record independently” and concluded that the plaintiffs did not so qualify. *Id.* at 713. This Court reversed, holding that “seaman” status under § 213 is a question of fact, and that the Ninth Circuit therefore erred in circumventing the district court’s role as factfinder. See *id.* at 713-714. The Court emphasized that the proper course for the appellate court, upon concluding the district court had failed to make the necessary factual findings, was to “remand[] to the District Court to make those findings” in the first instance. *Id.* at 714. The appellate court “should not simply have made factual findings on its own.” *Ibid.*; accord *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 268 (2015).

4. Permitting appellate courts to make first-instance *Batson* step-three determinations is irreconcilable with these “elementary” principles of appellate restraint. *Pullman-Standard*, 456 U.S. at 293.

Step three of *Batson* turns on whether the proponent of a peremptory strike was motivated by “purposeful discrimination.” *Batson*, 476 U.S. at 98. The answer to that question, no less than its Title VII cousin in *Pullman-Standard*, is a “pure issue of fact.” *Miller-El I*, 537 U.S. at 339 (quotation omitted); see also *Batson*, 476 U.S. at 98 n.21 (noting that *Batson* and Title VII involve parallel inquiries). Appellate courts therefore should not make “an independent determination of discriminatory purpose” in the first instance. *Pullman-Standard*, 456 U.S. at 286. That alone is enough to show that “decid[ing] *de novo*” whether a peremptory strike was discriminatory (*Alvarez-Ulloa*, 784 F.3d at 565) exceeds the proper boundaries of appellate review.

This conclusion follows particularly clearly because *Batson*’s step three turns on evidence that is inherently inaccessible on appeal. The ultimate issue in every step-three determination is whether to believe the proponent of a strike that they were not motivated by race. See *Hernandez*, 500 U.S. at 367 (noting that, once the proponent’s credibility has been resolved, “there seems nothing left to review”). That is a “difficult determination”—even compared to other credibility calls—because peremptory challenges can permissibly be based on almost anything, including gut-feelings and “subtle impressions.” *Ayala*, 576 U.S. at 285. The best (or only) evidence will thus often be “the demeanor of the attorney who exercises” the strike. *Snyder*, 552 U.S. at 477 (quotation omitted). In

making this call, district judges have an “on-the-spot comprehension” during voir dire that cannot be reproduced on appeal. *Skilling v. United States*, 561 U.S. 358, 386 (2010). Moreover, the context in which the court must look for red flags is a jury-selection process that trial courts sit through regularly and appellate judges may never have participated in at all.

Batson step-three determinations thus fall deep within the territory where trial-court primacy is at its apex: “determinations regarding the credibility of witnesses” and their intentions. *Anderson*, 470 U.S. at 575. For such determinations, the Court’s frequent cautions that appellate courts cannot resolve contested fact-questions carry the most force. By nevertheless permitting an appellate panel to “simply * * * ma[ke] factual findings on its own” (*Icicle Seafoods*, 475 U.S. at 714), the Fifth and Ninth Circuits have adopted an approach irreconcilable not only with *Batson* and its progeny’s emphasis on trial-court determination, but with the longstanding principles of appellate procedure that emphasis reflects.

D. Alternatively, the Court should vacate and remand in light of *Pitchford*.

If it does not grant plenary review, the Court should grant, vacate, and remand in light of the Court’s opinion in *Pitchford*.

In addition to confirming that trial-court participation in *Batson* step three is “essential” (608 U.S. at 395), and that the responsibility for applying step three “rests first and foremost” with the trial court (*id.* at 398-399), *Pitchford* broke new doctrinal ground regarding the procedures for complying with *Batson* step three. *Pitchford* held that *Batson* step three requires the court to provide the defense with “an

opportunity to rebut the prosecutor’s race-neutral reason[s] as pretextual,” prior to the court deciding the motion. *Id.* at 394. When the Court last encountered this issue in *Ayala*, it expressly declined to resolve whether *Batson* required such an opportunity. See 576 U.S. at 267 (“assum[ing] for the sake of argument” that *Batson* requires such an opportunity but treating the question as open). And while many courts encouraged such hearings in practice, a long-running circuit split existed regarding whether *Batson* required them. Compare, *e.g.*, *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988) (holding that *Batson* does not require courts to permit “rebuttal of the government’s reasons by the defense”), with *Majid v. Portuondo*, 428 F.3d 112, 128 (2d Cir. 2005) (treating the question as open), and *United States v. Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987) (requiring an opportunity for rebuttal).

Requiring adversarial factfinding and an opportunity for rebuttal as part of step three plainly presumes step three is being performed in front of a trial court—where the defendant can introduce evidence of pretext as part of an evidentiary proceeding—not on an appeal, out of the presence of the prosecutor and the defendant, based on a closed record and paper briefing. See Fed. R. App. P. 10(a), (e)(2) (providing that, other than omissions “by error or accident,” the appellate record is generally limited to materials that were before the trial court). That is, *Pitchford* has rendered the approach taken below untenable. Remand in light of *Pitchford* is thus warranted.

* * *

As the Court has often reminded federal courts, they are not “roving commissions” licensed to decide

questions not properly before them. *Margolin v. National Ass’n of Immigr. Judges*, 608 U.S. 339, 343 (2026) (quotation omitted). At the appellate level, respecting those limits means honoring the longstanding delegation of first-instance factfinding to the trial judges best qualified to engage in it. By authorizing appellate courts to make initial *Batson* step-three determinations, the Fifth and Ninth Circuits have failed to heed that principle. Further review is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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OCTOBER 2026